89- 1467

No. 89-

IN THE

Supreme Court Of The United States

October Term 1989

ELINOR ELLOSTEIN WRIGHT
MARGIE JUNE WRIGHT
RUTH ALICE WRIGHT
SYBIL THELMA WRIGHT,

Petitioners,

v.

LAND DEVELOPERS CONSTRUCTION COMPANY, INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In light of this Court's opinions in *Ex parte Alabama Oxygen*, 433 So.2d 1158 (Ala. 1983), *vacated and remanded*, 465 U.S. 1016 (1984), *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, ___ U.S. ___ (1989) that the Federal Arbitration Act "establishes a policy favoring arbitration . . ." can the Circuit Court of Jefferson County, Alabama and the Supreme Court of the Alabama ignore the doctrine of *functus officio* as applied to 9 U.S.C. 10(d) to allow (a) two (2) separate and distinct awards by the arbitrators, (b) violation of the doctrine of *functus officio* as defined by this Court in *Bayne v. Morris*, 1 Wall. 495 (1863) and (c) violation of *The Rules of the American Arbitration Association* for the construction industry?

PARTIES TO THE PROCEEDINGS BELOW AND LISTING OF PARENT CORPORATIONS, SUBSIDIARIES AND AFFILIATES

Plaintiffs

Elinor Ellostein Wright
Margie June Wright
Ruth Alice Wright
Sybil Thelma Wright

Defendant

Land Developers Construction Company, Inc.

Land Developers Construction Company, Inc. has no parent corporation, subsidiary corporation, or affiliated corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Elinor Ellostein Wright, Margie June Wright, Ruth Alice Wright and Sybil Thelma Wright respectfully request this Court issue a Writ of Certiorari to review the judgment of the Alabama Supreme Court entered in this action of December 15, 1989.

Petitioners submit that the decision of the Court below should be reversed on the authority of the provisions of the Federal Arbitration Act, 9 U.S.C. 10(d) and the Court's decision in *Bayne v. Morris*, 1 Wall. 495 (1863).

OPINION BELOW

The opinion of the Alabama Supreme Court is reported in 554 So. 2d 1000 (Ala. 1989) and is set forth in the Appendix to this Petition. (App. at A-1). The opinions of the Circuit Court of Jefferson County, Alabama are unreported and are set forth in the appendix to this Petition. (App. at A-7, and A-12). The "Interim Award" of September 30, 1988 and the "Award" of December 2, 1988 of the arbitrators are unreported and are set forth in the Appendix to this Petition. (App. at A-33 and A-29).

JURISDICTION

The opinion of the Alabama Supreme Court was filed on November 3, 1989, with Petitioner's Application for Rehearing denied on December 15, 1989. (App. A-1). This Court has jurisdiction to consider this Petition pursuant to 28 U.S.C. § 1257(3). This Court has jurisdiction to determine the substantive law as applied to 9 U.S.C. § 1 *et seq.*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and Statutes involved are: The Commerce Clause of Article 1, Section 8 of the United States Constitution; the Supremacy Clause of Article VI of the United States Constitution; The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* The Federal Arbitration Act has been reported in the Appendix to this Petition. (App. at A-61).

STATEMENT OF THE CASE

On October 10, 1986, the Petitioners entered into an agreement with the Respondent for the construction of the residential home known as "A residence for the Misses Wright." The document was the American Institute of Architects document A-101 entitled "Standard Form of Agreement Between Owner and Contractor." The contract contained nineteen (19) pages of printed language and eighteen (18) pages of amendment to the standard form

contract. Paragraph 7.9 of the agreement provided for arbitration of "all claims, disputes and other matters in question between the contractor and owner arising out of or relating to contract documents or breach thereof, . . . " (App. A-38). Pursuant to contract paragraph 7.9, demand for arbitration was made on February 8, 1988 listing thirteen distinct breaches of contract by the Respondent during the course of the construction of this residential home. (App. A-38).

The Respondent filed an answer and counter-claim for the demand of arbitration. (App. A-44, 45). Pursuant to the demand for arbitration, three (3) arbitrators were selected, namely, James H. Faulkner, Robert G. Robie, and Clorindo Belcolore. The arbitrators conducted a two (2) day hearing appearing on August 30 and 31 in Birmingham, Alabama, after which an award entitled "Interim Order and Award of Arbitrators" was rendered on October 2, 1988. (App. A-33). The request for clarification was filed by the Respondent and a "meeting" was held on October 19, 1988. (App. A-27). The Petitioner filed two (2) objections to the request for clarification yet a "meeting" was held on October 19, 1988 resulting in a revised award rendered on December 2, 1988. (App. A-29). The Petitioners filed a complaint to vacate award and a notice of appeal on December 16, 1988 and the Respondent filed an answer and a motion to confirm the award of arbitrators on December 20, 1988.

The motion to confirm the award of arbitrators was considered as a motion for summary judgment by the trial court and judgment was entered on January 26, 1989 confirming the December 2, 1988 award of the arbitrators. On February 24, 1989 the Petitioners filed a motion to reconsider and to modify the judgment of January 26, 1989 and said motion was denied by the trial court on March 29, 1989. (App. A-7).

Notice of appeal to the Supreme Court of the State of Alabama was filed on April 28, 1989. The Alabama Supreme Court rendered opinion on November 3, 1989 confirming the judgment of the trial court and denying the Petitioners' application for rehearing on December 15, 1989. In the

decision of the Supreme Court of Alabama reported in 554 So. 2d 1000 (Ala. 1989), the Alabama Supreme Court opined that decision of *McInnish v. Lanier*, 215 Ala. 87, 109 So. 377 (Ala. 1926), recognized the doctrine of *functus officio* as it applies to 9 U.S.C. 10(d). The Supreme Court of Alabama also cited *McInnish v. Lanier*, 215 Ala. 87, 109 So. 377 (Ala. 1926), for the proposition that arbitration award must be a final determination of all matters submitted to the arbitrators and that if further action of the arbitrator is necessary, there is no award. (App. A-4). In justifying the second award of the arbitrators in the instant case, the Supreme Court of Alabama cited *Michaels v. Mariforum Shipping, S.A.*, 624 Fd. 2d 411, 413 (2d Cir. 1980), *LaVale Plaza, Inc. v. R. S. Newnon*, 378 Fd. 2d 569 (3d Cir. 1967) and *A/S Siljestad v. Hideca Trading, Inc.*, 678 Fd. 2d. 391, 392 (2d Cir. 1982).

REASONS FOR GRANTING THE WRIT

I. The Ruling Below Creates Opportunity For Arbitrator Misconduct, Dilatory Actions By Parties And Uncertainty As To The Finality Of The Award

This Court has recognized that pursuant to 9 U.S.C. § 2, Congress has mandated that an alternative dispute resolution procedure be established as a substantive body of federal law where parties contractually agree to utilize the procedure. *Perry v. Thomas*, 482 U.S. 483 (1987), *Southland Corporation v. Keating*, 465 U.S. 1 (1984). In furtherance of this mandate favoring arbitration agreements, the federal judiciary is charged with controlling state courts' abusive or antagonistic opinions concerning the Federal Arbitration Act. *Perry, supra*, and *Ex parte Alabama Oxygen*, 433 So. 2d 1158 (Ala. 1983), *vacated and remanded*, 465 U.S. 1016 (1984).

Elementary considerations of arbitration law first involve the fact that arbitrators derive their powers from the agreements of the parties. *Flack-Bean Lumber Company v. Bass*, 62 So. 2d 235 (Ala. 1952). Obviously, the power to determine a controversy is not continuous or perpetual under the doctrine of *functus officio* as opined by the Supreme Court of Alabama in their decision of *McInnish v. Lanier*, 109 So. 377,

215 Ala. 87 (Ala. 1926) and cited in their decision in the instant case.

The common sense reason for the doctrine of *functus officio* is aptly explained by Professor Domke in his treatise *Domke on Commercial Arbitration (The Law and Practice of Commercial Arbitration)* revised edition by Gabriel M. Wilner, Kallahan Company, 1984. At page 337, Domke comments on the doctrine of *functus officio* as follows:

> "... This (functus officio) doctrine is applied in arbitration to prevent arbitrators from exercising a fresh judgment on the case and altering their award."

In *Bayne v. Morris*, 1 Wall. 495 (1863), this Court held that when an arbitrator rendered an award his power was exhausted and that he was *functus officio* — that his powers were at an end. This Court's decision in *Bayne, supra,* has not been reversed.

Since Congress has taken the overt action to impose a federal substantive body of arbitration law throughout the entire United States, the system must be uniform and free of misconduct by arbitrators vested with powers by the parties. The Petitioners submit that the only possible manner to accomplish this end is to declare that the doctrine of *functus officio* is contemplated under 9 U.S.C. 10(d). This would prevent the revisiting of awards that could result in public distrust of the arbitration procedure. The housing industry has a tremendous impact on the interstate commerce of the United States and the Congressional intent to regulate interstate commerce should not be diluted by state court action that is adverse to this power. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

The Alabama Supreme Court held that the second award of December 1, 1988 did not differ with the first award rendered on September 30, 1988. (App. A-1). A cursory reading of each award clearly indicates a complete reversal of the arbitrators' decision after the "meeting" of October 19, 1988 on the Respondent's request for clarification. The use

of the extended and protracted "jurisdiction" of the arbitrators has caused the procedure to become expensive, slow and subject to distrust by the Petitioners.

Albeit, there are certain instances when interim or interlocutory awards are proper especially in the commercial shipping industry. *Southern Seas Navigation Limited of Monrovia v. Petroleos Mexicanos of Mexico City,* 606 F.Supp. 692 (S.D.N.Y. 1985). Nevertheless, in *Southern Seas, supra,* the Court held that the "interim" award was enforceable as a final award regardless of the title placed on the award. Many instances also arise that require equitable relief to prevent irreparable harm to a party. That issue is not present in the instant case before this Court.

The arbitrators' award of October 2, 1988 directs the Respondent to perform certain construction projects to complete the Petitioners' home. The only matter that is left for future determination is the amount, if any, of liquidated damages for delay of performance. That order was final and left the arbitrators *functus officio.* The second "award" of December 2, 1988 reversed the first determination of the three arbitrators. The second award should have been declared void since the arbitrators were *functus officio.*

The second "award" appears to have been rendered on a consideration of extrinsic evidence that was not available during the original hearings of August, 1988. Where did the information originate and appear before the arbitrators that gave life to the second decision of the arbitrators? It is precisely this type of misconduct that creates public distrust of the arbitration procedure and the federal judiciary should seek to prevent any disruption of the integrity of the arbitration process under 9 U.S.C. § 1, *et seq.*

II. The Decision Below Validates And Approves The Violation Of The Rules Of Arbitration For The American Arbitration Association As Applied To The Construction Industry

The issue of finality of the arbitration award has been addressed in both the State and Federal Courts of Alabama. In *Parker v. Mercury Freight Lines, Inc.*, 307 F.Supp. 789 (N.D. Ala. 1969), Judge Allgood opined that once a decision was made in arbitration there was nothing that could be done to modify or revoke that award on the same issues. In reaching this decision, Judge Allgood quoted with approval the case of *Citizens Bank of West Palm Beach v. Western Union Telegraph Company*, 120 F.2d 982 (5th Cir. 1941), which states:

> "When an arbiter board renders a final award, its power and duties under submission are terminated. Its authority is not a continuing one, and, after its final decision is announced it is powerless to modify or revoke it or to make a new award upon the same issues. The first award disposes of all questions before arbiters and was final; the publication of that decision exhausted the powers of those appointed even though the action taken was void, and the second award is no more than the first."

The decision in *Citizen Bank, supra,* is based upon the fact that the arbiter board was precluded from making further decisions because of the doctrine of *functus officio.* There can be but one award and after the return of that award, the arbitrators are without authority to modify or correct the award and thus th arbitrators' authority is terminated. See, *Black v. Woodruff*, 69 So. 2d 97, 193 Ala. 327 (1915).

The opinions of the Circuit Court of Jefferson County and the Alabama Supreme Court confirming and acknowledging the second award of the arbitrators made on December 2, 1988 clearly violate the decisions in *Parker, supra; Citizens Bank, supra;* and *Black, supra.* Moreover, the decision below is a clear and direct violation of Rule 36 of the *Construction*

Industry Arbitration Rules promulgated by the American Arbitration Association (App. A-47, 55). Rule 36 provides as follows:

> "The hearing may be reopened by the arbitrator at will or upon application of a party at any time before the award is made. If the reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless the parties agree upon the extension of such time limit. When no specific date is fixed in the contract, the arbitrator may reopen the hearings, and the arbitrator shall have thirty days from the closing of the reopened hearings within which to make the award."

(App. A-55).

A final award of the arbitrators was made on September 30, 1988. A clarification request of that order was filed in October, 1988. Rule 36 clearly states that a hearing may be reopened "upon the application of a party at any time before the award is made." The granting of the hearing on the clarification contravenes the *Rules of Arbitration* as set forth in Rule 36 since it was made after the first award was rendered. Furthermore, the second award dated December 2, 1988 was tendered forty-one (41) days after the close of the "reopened hearing," clearly more than the prescribed thirty (30) days promulgated by the Rules. In addition Rule 41 provides that:

> "The award shall be made promptly by the arbitrator, unless otherwise agreed by the parties, or specified by law, no later than thirty days from the date of the closing of the hearings, or if oral hearing have been waived, from the date of transmitting the final statements and proofs to the arbitrator."

(App. A-56).

Once again, the *Rules of Arbitration* limit the decision making process of the arbitrators to a period of thirty (30) days. The parties to the arbitration should expect arbitrators to con-

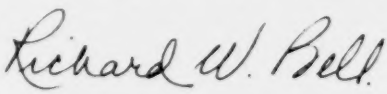
form to rules and procedures of the American Arbitration Association without exception.

Thus the decision below, which confirms and acknowledges a second award of the arbitrators after a final award has been rendered on September 30, 1988, validates and approves of the violation of the *Rules of Arbitration for the American Arbitration Association* as applied to the Construction Industry.

CONCLUSION

For the reason set forth above, this Court should grant a Writ of Certiorari to review the judgment of the Alabama Supreme Court on these important issues of federal and constitutional laws. The Writ of Certiorari should be granted to prevent a deterioration of the arbitration procedure in the State of Alabama and the United States under the provisions of 9 U.S.C. § 1, *et seq.*

Respectfully submitted,



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APPENDIX

A-1

Elinor Ellostein WRIGHT, et al.

v.

LAND DEVELOPERS CONSTRUCTION COMPANY, INC.

88-972

Supreme Court of Alabama

Nov. 3, 1989

Rehearing Denied Dec. 15, 1989

STEGALL, Justice.

Elinor Ellostein Wright, Margie June Wright, Ruth Alice Wright, and Sybil Thelma Wright (all sisters) contracted with Land Developers Construction Company, Inc. (hereinafter "Land Developers"), on October 10, 1986, for the construction of a house in Vestavia Hills at an estimated price of $253,728. The contract specifically provided for resolution of disputes or claims through arbitration.[1] Sometime after work on the house had commenced, a disagreement arose between the Wright sisters and Land Developers concerning the construction of a retaining wall, and, on February 8, 1988, the Wrights filed a demand for arbitration with the American Arbitration Association. The demand alleged, *inter alia*, that: 1) Land Developers had failed to substantially complete the house by April 10, 1987 (as required by the contract); 2) the company did not "use reasonable efforts in reaching an agreement with the owners" regarding the driveways, walks, and retaining walls; 3) the company had abandoned construction of the house, in violation of the contract; 4) construction on the house was not of the quality required by the terms of the contract; and 5) the company's refusal to resume construction precluded the Wrights from inhabiting the house and rendered it unmarketable.

---

[1]Both sides concede the applicability of the Federal Arbitration Act to this case; therefore, there is no issue presented as to whether this case involved a contract in "interstate commerce." *See Ex parte Warren*, 548 So.2d 157 (Ala. 1989).

The three arbitrators that were selected, James H. Faulkner, Robert G. Robie, and Clorindo Belcolore, held a two-day hearing and, on September 30, 1988, issued an "Interim Order and Award of Arbitrators." That order required Land Developers among other things, to obtain the necessary insurance for the duration of the project, to repair any damage to the residence that had occurred since Land Developers had left the job, and to complete all "punch list" items given to it by William Chambers, the arbitration architect appointed by the panel. It also required the Wrights to make payment to Land Developers as follows:

"Retainage	$11,288.17
"Balance on contract	$29,749.61
"C.O. #14 Extra for retaining wall	$ 3,776.61
	$44,813.78"[2]

The last sentence of the order reads, "The arbitration panel retains jurisdiction in this arbitration to render a final award."

In line with that reservation of jurisdiction, the Wrights' attorney requested, in a letter to the American Arbitration Association dated November 23, 1988, that the panel retain jurisdiction until the contractor had complied with the interim order and award. That letter also requested that Land Developers specifically perform the construction of the retaining wall as set out in the interim award.

Thereafter, Chambers employed a structural engineer to design the retaining wall; that engineer's estimate was considerably higher than the original contract estimate. Because of the discrepancy, Land Developers filed a "Request for Clarification of Interim Order" and a "Request for Final Order," to which the Wrights filed an objection. A meeting between the arbitrators took place in Faulkner's office and, on December 2, 1988, the arbitrators entered a final award in which the Wrights were ordered to pay $17,754.93 as the

[2]Our calculation shows the sum of these three figures to be $44,814.39.

balance due under the contract. That amount was calculated as follows:

"Contract price	$255,512.73
"Total payments to date	213,510.80
	42,001.98
"Less: Credits	21,747.00
	20,254.93
"Less: Liquidated damages	2,500.00
"Balance due Contractor	$ 17,754.93"

The panel did not, however, order specific performance in the construction of the retaining wall, because it found that such performance would exceed that intended or contemplated by the parties when they entered into the contract.

The Wrights filed a complaint in circuit court on December 16, 1988. The trial court treated Land Developer's motion to confirm the award as a motion for summary judgment, which it granted after an ore tenus hearing, and entered a final judgment in favor of Land Developers. The Wrights filed a motion to amend the judgment, which the trial court denied on March 29, 1989.

The basis for the trial court's judgment in favor of Land Developers was that the Wrights had not proven any one of the five grounds available for vacating an arbitration panel's award as provided in 9 U.S.C. § 10, the Federal Arbitration Act. Those grounds are:

> "(a) Where the award was procured by corruption, fraud, or undue means.
>
> "(b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> "(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

> "(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> "(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

On appeal, the Wrights contend that the arbitrators' first award of September 30 was final and binding and that the second award should be vacated based on the doctrine of functus officio.[3]

We have previously held with regard to arbitration orders that "[t]he award must be a final determination of the matters submitted," and that "[i]f any further action of a judicial nature remains to be had by the arbitrators there is no award." *McInnish v. Lanier*, 215 Ala. 87, 87, 109 So. 377, 377 (1926). See, also, *Mercury Oil Refining Co. v. Oil Workers Int'l Union, CIO*, 187 F.2d 980 (10th Cir. 1951). "An arbitration award is generally not final if it is not intended by the arbitrators to be a complete determination of all of the claims submitted to them." *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 413 (2d Cir. 1980); *La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967)." *A/S Siljestad v. Hideca Trading, Inc.*, 678 F.2d 391, 392 (2d Cir. 1982). The question before us, then, is whether "[t]he first award disposed of all questions before the arbiters." *Citizens Bldg. v. Western Union Tel. Co.*, 120 F.2d 982 (5th Cir. 1941).

In its order denying the Wrights' motion to amend, the trial court made the following finding:

> "The first award made by the arbitrators was clearly labelled an interim award. The terms of the award itself made it clear that the arbitrators were

---

[3]Although Land Developers argues that the Wrights did not raise the issue of *functus officio* until they filed their motion to amend the court's final judgment, we find that the Wrights' complaint, which states that the arbitrators "imperfectly executed their powers," 9 U.S.C. § 10(d), sufficiently raised this issue before the trial court and preserved it for appeal.

seeking to provide equitable relief by having the contractor himself carry out the terms of the contract. It was obviously necessary for the arbitrators to retain jurisdiction to provide other remedies in the event that the contractor either refused or was unable to comply with the contract. The last sentence of the award provides: 'The arbitration panel retains jurisdiction in this arbitration to render a final award.'

". . .

"In the present case, this Court considers that the arbitrators did not revoke their earlier award but determined that they should award damages to the Wrights in lieu of performance in erecting the retaining wall.

"It appears that the Wrights object perhaps on the grounds that the damages awarded are insufficient when measured against the cost of the construction of the retaining wall.

". . .

"Having considered the evidence and the arguments of both sides of the controversy, the arbitrators determined to allow the Wrights the sum of $16,222.00 as damages in lieu of the construction of the retaining wall. This issue of the cost of the wall was hotly disputed by the parties, and the arbitrators made a final determination on the same.

"It is not for this Court to retry this issue and itself determine from the evidence what damages it should allow for the retaining wall.

"As this Court has stated in its Final Judgment, no ground has been shown by the Wrights sufficient to authorize this Court to vacate or set aside the award made by the arbitrators.

"Accordingly, the motion filed by the plaintiffs to reconsider and modify the judgment is hereby overruled."

It is clear from the substance of the interim order that the issues of specific performance and/or damages were unre-

solved and not addressed; those were handled for the first time in the December 2 order. In essence, the second order did not "change" the content of the first order but, rather, handled new issues that arose after the interim order. Furthermore, the arbitrators clearly indicated that the "interim" order was not intended to be "final."

After reviewing the record, we do not find the trial court's judgment to be plainly and palpably wrong, *Moore v. Williams*, 519 So.2d 1337 (Ala. 1988). It is affirmed.

AFFIRMED.

HORNSBY, C.J., and MADDOX, ADAMS and HOUSTON, JJ., concur.

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
EQUITY DIVISION

ELINOR ELLOSTEIN WRIGHT, et al.,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION
LAND DEVELOPERS CONSTRUCTION COMPANY, INC.	)	NO. CV 88 505 262 MC
Defendant.	)	

ORDER

This case has now been submitted for decision on the motion filed by the plaintiffs asking this Court to reconsider and modify the Final Judgment rendered by this Court on January 26, 1989.

This case involves the attempt of the plaintiffs to challenge an arbitration award made by arbitrators pursuant to the construction industry arbitration rules of the American Arbitration Association.

The plaintiffs representing themselves spent some time both in their brief and in oral argument expressing their dissatisfaction with the work carried out by Land Developers Construction Company, Inc., under the contract entered into by it with the plaintiffs and also their dissatisfaction with the award made by the arbitrators.

This Court has already referred in the Final Judgment rendered in this case to the proceedings before the arbitrators and the final award made by the arbitrators.

While the plaintiffs make a number of grounds for objection, such as errors made by the arbitrators in procedure as well as substantive law, it appears that one of the main arguments advanced is that the arbitrators made an award first on September 30, 1988, and had no power thereafter to alter, amend or change that award.

The first award made by the arbitrators was plainly captioned, "Interim Order and Award of Arbitrators." In that award, the contractor, Land Developers, was ordered to institute builder's risk policy and other insurance; to repair all damage the residence suffered since Land Developers left the job; to complete all punch list items given Land Developers by the arbitration architect duly appointed by the arbitrators. The arbitrators appointed William N. Chamber as architect for the performance of the work with the provision that his fees would be paid fifty percent by plaintiffs and fifty percent by the defendant. Paragraph five of the interim order provided that the work would be completed within twenty-eight calendar days from the date of service on the parties of the award with seven days allowed for rain days, and with Land Developers to be assessed $500.00 per day as liquidated damages if the work was not completed within the four week period.

Retaining walls, walks and drives were to be installed per drawing prepared by William Arnold, architect. It was further provided that the design of the concrete wall along the west, north and turn area to be designed by a structural engineer if walls exceed the height permitted in contract documents of twelve feet eight inches. The cost of the structural design was to be paid by Wright.

It appears that the main bone of contention now relates to the retaining wall.

Land Developers argue after the interim award was made that under the original documents used by Land Developers to develop a bid estimate for drives, walkways and retaining walls, the total length of the wall was shown to be eighty feet. Land Developers took the position that the height of the wall was to be ten feet. This was disputed by the Wrights. Some argument was made that the drawings at the most required only twelve feet eight inches in height. In any event, the architect selected by the parties to supervise the completion of construction requested a structural engineer to produce a design for a retaining wall. This design provided for much deeper footing and a stronger wall, which was considered

necessary in order to maintain stability. This design also provided for a poured concrete wall rather than a cement block wall with the interior filled with reinforcing rods. Land Developers states that it received a bid for the new design in the approximate amount of $83,000.00.

According to the papers filed by Land Developers, a meeting was held with the arbitrators and Wright's attorney, Jesse Evans, at which time the arbitrators instructed Land Developers to contact BRIC Contracting Company. BRIC had submitted an estimate directly to Wright for construction of the driveways, walls and retaining wall on October 13, 1987, for $34,618.00. It appears from a subsequent letter written by Rick Bentley of BRIC that his bid had not included the retaining wall at issue. Of course, this is a matter of controversy between the parties.

In any event, it was the position of Land Developers before the arbitrators that on the advice of experts, it was not possible to construct a retaining wall in accordance with the plans and specifications originally submitted which would have sufficient stability.

It was the position of the Wrights that Land Developers was seeking through the device of designing a retaining wall which would involve an extraordinary cost to avoid its obligations under the interim award. The Wrights take the position that the Interim award should remain in effect requiring Land Develoopers to construct a retaining wall within twenty-eight days.

After considering the positions of the various parties, the arbitrators made a final award on December 2, 1988. The final award gave Ellostein Wright credit in the total amount of $21,747.00 against the original contract price of $255,512.73. Of this amount, a credit of $2,500.00 was given for landscaping to be done by the owner. A credit of $16,222.00 was given for construction of a retaining wall to be done by the owner, and a credit of $3,025.00 was allowed for the driveway to be done by the owner. This same award allowed liquidated damages in the amount of $2,500.00 in addition to the credit of $21,747.00, making the balance due the contractor from Ellostein Wright the sum of $17,754.93.

Aside from arguing that the arbitrators' award was erroneous and contrary to the evidence, the Wrights also strenuously argue that the interim award was a final order and that the arbitrators had no authority thereafter to change it.

Paragraph 43 of the Construction Industry Arbitration Rules provides: "The arbitrator may grant any remedy or relief that is just, equitable, and within the terms of the agreement of the parties. . . . "

The first award made by the arbitrators was clearly labelled an interim award. The terms of the award itself made it clear that the arbitrators were seeking to provide equitable relief by having the contractor himself carry out the terms of the contract. It was obviously necessary for the arbitrators to retain jurisdiction to provide other remedies in the event that the contractor either refused or was unable to comply with the contract. The last sentence of the award provides: "The arbitration panel retains jurisdiction in this arbitration to render a final award."

Nevertheless, the Wrights now say that the arbitrators having made an award which required the contractor to complete the retaining wall, they thereafter had no authority to change or amend their award. The Court cannot accept this argument. Obviosuly, where there has been a failure to perform, the arbitrators may provide an alternate remedy of awarding damages in lieu of performance.

In 5 Am. Jr. 2d § 40, p. 550, the following statement is found: "After a valid, final award has been made, revocation is impossible, for the agreement is no longer executory. But where the award actually rendered is interlocutory, and not final, in character, by reason of incompleteness or for other cause, it is insufficient to bar revocation. . . . "

In the present case, this Court considers that the arbitrators did not revoke their earlier award but determined that they should award damages to the Wrights in lieu of performance in erecting the retaining wall.

It appears that the Wrights object perhaps on the ground that the damages awarded are insufficient when measured against the cost of the construction of the retaining wall.

Here, there is a question of the evidence submitted to the arbitrators. On the one hand, Land Developers argued that the cost of the retaining wall shown in the plans and specifications, if such a retaining wall could have been installed as a stable retaining wall, would have been in the neighborhood of $10,000.00 or so. On the other hand, the Wrights argue that Land Developers was bound to install a stable retaining wall because Land Developers had ample opportunity to inspect the site and determine for itself the nature of the retaining wall which would have been necessary to achieve stability. The Wrights also argue that the initial award required Land Developers to install the retaining wall in accordance with designs made by William Arnold, and possibly the designs prepared by a structural engineer.

Having considered the evidence and the arguments of both sides of the controversy, the arbitrators determined to allow the Wrights the sum of $16,222.00 as damages in lieu of the construction of the retaining wall. This issue of the cost of the wall was hotly disputed by the parties, and the arbitrators made a final determination on the same.

It is not for this Court to retry this issue and itself determine from the evidence what damages it should allow for the retaining wall.

As this Court has stated in its Final Judgment, no ground has been shown by the Wrights sufficient to authorize this Court to vacate or set aside the award made by the arbitrators.

Accordingly, the motion filed by the plaintiffs to reconsider and modify the judgment is hereby overruled.

Done this 29th day of March, 1989.

/s/ Marvin Cherner

CIRCUIT JUDGE

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
EQUITY DIVISION

ELINOR ELLOSTEIN WRIGHT, et al.,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION
LAND DEVELOPERS	)	NO.
CONSTRUCTION COMPANY, INC.	)	CV 88 505 262 MC
Defendant.	)	

FINAL JUDGMENT

This case has now been submitted for decision on the motion of the defendant, Land Developers Construction Company, Inc. ("Land Developers", to confirm the award of arbitrators pursuant to § 6-6-12, Alabama Code 1975, which provides as follows:

> If the award is not performed in ten days after notice and delivery of a copy thereof, the successful party may, if an action is pending, cause the award and the file of papers in the case to be returned to the Court in which the action is pending or, if no action is pending, cause the submission and award to be returned to the clerk of the circuit court of the county in which the award is made. Such award has the force and effect of a judgment, upon which execution may issue as in other cases.

This case was begun by the filing of a complaint by the Wrights seeking to vacate an arbitration award effective as of December 6, 1988.

The subject matter of the arbitration was a controversy over the performance by Land Developers of a contract for the construction and erection of a residential dwelling on property owned by the Wrights, including the construction of a west driveway and a supporting retaining wall.

The complaint and answer and the materials filed with the Court indicate that the parties agreed on the selection of the three arbitrators in accordance with the rules of the American Arbitration Association. The three arbitrators were James H. Faulkner, Robert G. Robie, and Clorindo Belcolore. Extensive proceedings were conducted before these three arbitrators relative to the matters at issue between the parties regarding the contract and the obligations of the Wrights and the obligations of Land Developers under the contract.

The arbitrators initially issued what has been captioned as an "Interim Order and Award of Arbitrators." In connection with the Interim Order, the arbitrators appointed William N. Chambers as architect for the performance of the work. The architect was assigned the duty of seeing that the contract work to be performed by Land Developers was done according to the plans and specifications. The Interim Order also provided that his fees would be paid fifty percent each by the Wrights and by Land Developers. There was then a request for a clarification of the arbitrators' Interim Order.

There were also a number of objections to the arbitrators' Interim Order by the Wrights. One of the major areas of controversy involved the retaining wall. It was the position of Land Developers that it relied on plans and specifications in connection with its original bid and agreement to construct the house and other improvements and that subsequently the Wrights submitted a design of the concrete retaining wall which showed a much longer and higher wall with much more reinforcement than was shown in the original drawings. The estimated cost for the construction of the retaining wall ranged from approximately $16,000.00 to approximately $83,000.00. The cost apparently depended on the design of the retaining wall and the size of the same.

The Interim Order and award of the arbitrators contemplated the completion of a punch list of items given Land Developers by the arbitration architect as well as the completion of certain remaining work to be done including the construction of the retaining walls, removal and reinstallation of field dirt.

By the final award made by the arbitrators as of December 6, 1988, the arbitrators determined based on the certificate of its architect that the construction of the house was completed on November 21, 1988. The arbitrators allowed credits for the following items:

Landscaping to be done by owner	$ 2,500.00
Construction of retaining wall to be done by owner	16,222.00
Driveway to be done by owner	3,025.00
Total Credits	$21,747.00

The arbitrators also assessed the sum of $2,500.00 as liquidated damages based on five days delay at $500.00 per day.

The arbitrators computed the amount due the contractor by the owner as follows:

Contract price	$255,512.73
Total payments to date	213,510.80
	$42,001.93
Less Credits	– 21,747.00
	$20,254.93
Less liquidated damages	– 2,500.00
Balance due contractor	$ 17,754.93

The arbitrators ordered that Ellostein Wright pay to Land Developers the amount of $17,754.93 within ten days from the date of the award which was by all accounts not later than December 16, 1988.

The architect was awarded a fee of $3,500.00, of which $1,750.00 was to be paid by Land Developers and $1,750.00 was to be paid by Ellostein Wright.

The arbitrators further ordered that the administrative fees and expenses of the American Arbitration Association totalling $3,478.27 would be born equally between the parties. The arbitrators ordered Ellostein Wright to pay the balance of $84.61 due as her share of the administrative fees and expenses due the Association. They ordered Land

Developers to pay the sum of $1,062.88 for that portion of its share of the administrative fees and expenses still due the Association.

Finally, the arbitrators stated that the total compensation of the arbitrators was $3,780.00 and would also be born equally by the parties. They ordered Ellostein Wright to pay $1,260.00 representing the compensation still due from her to the arbitrators, and they ordered Land Developers to pay the sum of $1,270.00 representing the balance of its share of the compensation due from it to the arbitrators.

Agreements to arbitrate are now governed by the Federal Arbitration Act with respect to all such agreements involving interstate commerce. Grounds for vacating an award made by an arbitrator are set out in Section 10 of the Act, which provides as follows:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutal, final and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement require the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Upon review of the documents and other evidence submitted in this case, it does not appear that the plaintiffs have

shown any grounds such as those required by Section 10 for vacating the arbitrators' award in the present case. In 5 Am. Jur. 2d § 167, the following statement of general principles is found:

> Nothing in the award relative to the merits of the controversy as submitted, however wrongly decided, is ground for setting it aside. An award will not be set aside merely because the arbitrators did not follow strictly legal rules in hearing and deciding the case, unless they were required by the submission or by statute to follow such rules. And an award will not be set aside merely because the arbitrators fail to state separately the facts found in their conclusions of law, at least unless the submission requires such a separate statement. Nor will a court interfere on the plea of one of the parties that he made a mistake in his testimony, or because one of the arbitrators had a change of heart and later thinks he made a mistake in his award, provided such arbitrator was fully aware of the contents of the award and its effect at the time it was made. . . .

In *San Martine Compania De Navegacion v. Saguenay Terminals, Ltd.*, 293 F.2d 796 (9th Cir. 1961), the parties submitted to arbitration the controversy between them over the notice of the owners to cancel the charter of a vessel in the event that Canada, the United Kingdom or the United States became involved in hostilities leading to the requisition of their mercantile marine by any of those countries.

The arbitrators concluded that San Martine was within its rights in cancelling its charter and also ruled that Saguenay should pay to the owners certain amounts as the profit that it made on the operation of the vessel during the 1957 season. The arbitrators also awarded the owners additional compensation for the loss of time to their ship and expenses in connection with its detention in Hawaii.

Reversing the decision of the trial court which vacated the arbitration award, the court of appeals stated in its opinion:

> Appellee's argument is, therefore, that since none of the things done by Saguenay for which damages

were awarded constituted a breach or violation of the charter party, the arbitrators had no authority to award the damages here in question. In short, the contention is that the arbitrators before awarding damages must first have found that Saguenay had breached or violated the charter party, and since the arbitrators did not and could not make any such finding, the award of these sums was in excess of their authority.

* * *

It may well be that the arbitrators' views of the facts and of the law relating to the matters on account of which they awarded damages are open to serious question. Were it material here it might be possible to question whether the award for the profits received from The Linda would come within the ordinary rules of law relating to unjust enrichment or recovery therefor.

With respect to the award arising out of San Martine's expenses incident to the attachment detention of the Santa Ana at Honolulu, it may well be that the arbitrators' view of the law was questionable. There is no proof of malice in making attachment there rather than at Tampa, and hence the arbitrators may have been mistaken in their view of the law respecting abuse of process, if that was the rationale of their decision.

But an award of such as this, which is one within the terms of the submission, will not be set aside by the Court for error either in law or fact. This rule and the reasons for it were set forth in Burchell v. Marsh, 17 How. 344, 58 U.S. 344, 349, 15 L.Ed. 96: "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitute of the judg-

> ment of the Chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation."

Also see, e.g., Sperry Intern. Trade, Inc. v. Government of Israel, 602 F.Supp. 1440 (S.D.N.Y 1985), in which the district judge stated in his opinion in part:

> The law is well settled that a court may not review any of the findings of fact or applications of law by the arbitrators. An arbitrator's conclusions involve matters of judgment, and it would be contrary to the intent of an arbitration agreement for a court to interfere; the parties, by agreeing to an arbitration, did not intend the Court's determination to replace that made by the arbitrators. Consequently, in post-award proceedings, an arbitrator cannot "be examined for the purpose of impeaching his award," Brownko Int'l, Inc. v. Ogden, 585 F.Supp. 1432, 1435 (S.D.N.Y. 1983), or be impeached by his voluntary statements. See Big-W Construction Corp. v. Horowitz, 28 Misc. 2d 145, 155-56, 192 N.Y.S.2d 721, 733-34, aff'd, 14 A.D.2d 817, 218 N.Y.S.2d 530 (N.Y. App. Div. 1961). See also Gramling v. Food Machinery and Chemical Corp., 151 F.Supp. 853, 860 (W.D.S.C. 1957).

Other decisions following the same principles include *Benjamin F. Shaw Co. v. Cincinnati Gas & Electric,* 633 F.Supp. 841 (S.D. Ohio 1986); *Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corp.,* 274 F.2d 805 (2d Cir. 1960).

As noted above, the award of the arbitrators is final and cannot be set aside even if the arbitrators made a mistake of fact or law in making the arbitration award. The plaintiffs have not shown any of the grounds set forth in Section 10 of the Federal Arbitration Act for vacating or setting aside the award.

The motion to confirm the award of the arbitrators filed by Land Developers has been considered by the Court as being in the nature of a motion for summary judgment filed by Land Developers in its favor. The same has been sub-

mitted after adequate notice to both parties and has been thoroughly argued and briefed.

The Court hereby concludes that the motion to confirm the award of the arbitrators is due to be granted. Accordingly, the prayer of the plaintiffs that the final award of the arbitrators be vacated is hereby denied.

The motion to confirm the award of the arbitrators is hereby granted. Judgment is hereby rendered in favor of Land Developers Construction Company, Inc., against Ellostein Wright in the amount of $17,754.90 plus interest at the rate of six percent per annum computed from December 16, 1988.

Ellostein Wright and Land Developers Construction Company, Inc., are hereby directed to pay the sum of $1,750.00 each to the architect, William Chambers, representing his compensation for services rendered in the arbitration in the total amount of $3,500.00.

Ellostein Wright is hereby directed to pay to American Arbitration Association the sum of $84.61 representing her share of the administrative fees and expenses due from her to the Association. Land Developers is hereby directed to pay the American Arbitration Association the sum of $1,062.88 representing that portion of its share of administrative fees and expenses still due the Association.

Ellostein Wright is further directed to pay to American Arbitration Association the sum of $1,260.00 for compensation still due the arbitrators from her. Land Developers is hereby directed to pay the American Arbitration Association the sum of $1,270.00 representing the amount still due from it as compensation for the arbitrators.

All costs of court incurred in this proceeding are hereby taxed against Ellostein Wright.

Done this 26 day of January, 1989.

/s/ Marvin Cherner

CIRCUIT JUDGE

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
IN EQUITY

ELINOR ELLOSTEIN WRIGHT,	)	
MARGIE JUNE WRIGHT,	)	
RUTH A. WRIGHT, and	)	
SYBIL THELMA WRIGHT	)	
Plaintiffs	)	CIVIL ACTION
- vs -	)	NUMBER:
LAND DEVELOPERS	)	
CONSTRUCTION COMPANY,	)	
INC.	)	
Defendants	)	

COMPLAINT AND NOTICE OF APPEAL

Come now Plaintiffs and say as follows:

I. NOTICE OF APPEAL

Plaintiffs appeal the award of James H. Faulkner, Robert G. Robie and Clorindo Belcolore, Arbitrators, designated in accordance with the arbitration agreement, a part of the agreement betwen the Plaintiffs and Defendant entered into on October 10, 1986, said award being last executed by the Arbitrators on December 5, 1988, mailed to the parties on December 6, 1988, and received by the Plaintiffs on December 8, 1988.

Filed with this Notice of Appeal is a copy of the Interim Order and Award of Arbitrators, effective October 3, 1988 and the final Award of Arbitrators, effective December 6, 1988, both signed by the Arbitrators.

II. COMPLAINT TO VACATE AWARD

Plaintiffs request the court to vacate the Award of Arbitrators, which has its effective date of December 6, 1988, filed herewith, and as grounds therefor say as follows:

1. On or about February 8, 1988, Plaintiffs filed a Demand for Arbitration, copy attached, with the Regional Office, American Arbitration Association, 1197 Peachtree Street N.E., Atlanta, Georgia 30361-3598, pursuant to an arbitration clause contained in their agreement with Defendants dated October 10, 1986, copy attached. Also attached hereto is Defendant's Answer to Plaintiff's Demand and Defendant's Counterclaim, both undated.

2. The subject matter of Plaintiff's Demand for Arbitration was the completion of a residential dwelling on certain property owned by Plaintiffs, including construction of a west driveway essential for access to garages and a supporting retaining wall, all of which, by contract, should have been completed as of April 10, 1987. As of August 31, 1987, the dwelling was far from complete and the driveway and retaining wall had not been commenced. At that time Defendant walked off the job without notice to Plaintiffs.

3. The goods, supplies and materials used in and about the construction of the residential dwelling were obtained through and sufficiently connected with interstate commerce as to make the provisions of the Federal Arbitration Act (8 U.S.C. § 1, et seq.) applicable.

4. On to wit, August 30, 1988 and August 31, 1988, a hearing was held on the Plaintiffs' claims and Defendant's response and, effective October 3, 1988, the arbitrators appointed by the American Arbitration Association issued an Interim Order and Award of Arbitrators, copy attached.

5. Defendants, inter alia, were ordered to complete the residence in accordance with the contract documents, to construct the west driveway and retaining wall, and to provide insurance coverage for the project which they had discontinued on the 5th of February, 1988, all to be accomplished within twenty-eight (28) calendar days (with an allowance of seven (7) rain days). A penalty of Five Hundred Dollars per day was to be assessed for each day beyond the allowed number of days for completion of the project. An architect was appointed to see that the work was done in accordance with the provisions of the contract documents and the Interim Order and Award of Arbitrators.

6. On or about October 19, 1988, Defendants requested and was granted a meeting with the Arbitrators which took place in the office of one of them on October 19, 1988. Only two arbitrators were in attendance at the meeting, the third resides in Mobile, Alabama and was not present. At this meeting Defendant's company president, an attorney, who had not participated in the arbitration hearing, was permitted to attend and take part in the discussions. At that meeting Defendants filed with the Arbitrators an undated document entitled "Clarification of Order of Arbitrators Requested by Land", copy attached.

7. As of the date of the October 19, 1988 meeting Defendants had not obtained the necessary insurance coverage as ordered by the Arbitrators and at that meeting protested that they were unable to secure the coverage. However, when confronted with evidence provided by Plaintiffs that the insurance had been available, Defendants then advised they had the insurance and evidence thereof would be furnished Plaintiffs the following day. It was not forthcoming from Defendants as promised.

8. Furthermore, Defendants failed to make reasonable effort to commence construction of the west driveway and retaining wall as provided in the Interim Order and Award of Arbitrators during the entire time that order and award was in effect, so that on the date of issuance of the final award by the Arbitrators, Plaintiffs not only had no access to their garage, but were left with a very serious problem caused by deterioration of the fill earth in a non-compacted bank on the west side of their property, located within fifteen feet more or less of the residence.

9. Shortly after the above-mentioned meeting of October 19, 1988, Plaintiffs were told by the architect appointed by the Arbitrators that Defendants had been granted a fourteen (14) day extension of time in which to complete just the residential structure itself. No official notice was received by Plaintiffs from either the American Arbitration Association or the Arbitrators concerning the purported extension which was subsequently included in the final Award of Arbitrators. Immediately following the October 19, 1988 meeting, how-

ever, no work was performed on the project by Defendants although the architect in charge informed Plaintiffs that he had made repeated requests for Defendants to return to work.

10. On October 24, 1988, Plaintiffs filed their response to Defendants' "Clarification of Order of Arbitrators Requested by Land", copy attached.

11. On November 5, 1988, evidence of insurance coverage still not having been received, Plaintiffs took the drastic action of posting notices on the property denying access to the project until evidence of insurance on the project was furnished by Defendants, and on November 7, 1988 a supplement to Plaintiffs' response to Defendants' "Clarification of Order of Arbitrators Requested by Land", copy attached, was filed with the Regional Office of the American Arbitration Association. Thereafter, while not completely in proper form, Defendants furnished evidence of insurance. In that same supplement Plaintiffs also protested the purported fourteen day extension of time for completion of the house since Defendants failed to perform any work on the project for, by Plaintiff's calculation, a period of at least seven days. No response was received by Plaintiff's from the Association or from the Arbitrators. Insurance problems continued throughout the entire period of the Interim Order and Award of Arbitrators culminating with personal contact by one of the Plaintiffs with a representative of Defendants' insurance agency on the 5th of December, 1988, three days before receipt of the final Award of Arbitrators.

12. Although the house was still incomplete and no work had commenced on the west driveway and retaining wall, Defendants filed a document on November 7, 1988 with the Atlanta Regional Office of the American Arbitration Association entitled "Clarification of Interim Award and Request for Final Order", copy attached.

13. Plaintiffs responded to Defendants' "Clarification of Interim Award and Request for Final Order" on November 21, 1988. On that same date Plaintiffs were advised by the Building Inspector of Vestavia Hills, Alabama that he had been informed that Plaintiffs had accepted a monetary

settlement in lieu of completion of the west driveway and the retaining wall, a statement that was not true. Upon being informed to that effect, the Building Inspector of Vestavia Hills, Alabama advised Plaintiffs that the "Certificate of Occupancy" would not be issued until after the final award was made by the Arbitrators.

14. Because of an error in the "General Change Endorsement" pertaining to insurance coverage on the project, Plaintiffs made personal contact with a representative of Defendants' insurance agency on December 5, 1988. The representative recognized the error and advised Plaintiffs that it would be corrected after she had contacted Defendants' president and that Plaintiffs would be furnished with the corrected endorsement via mail the following day. When the endorsement was not received Plaintiffs again contacted the agency representative and was told that she had contacted Defendants' president and had been advised that "things were happening now" and that he did not want her to send Plaintiffs anything until after the Arbitrator's final award was made.

15. Because of the statement by the Building Inspector concerning the purported monetary settlement, Plaintiffs conversation with Defendants' insurance agency representative, the fact that Defendants worked far into the night on November 21, 1988 in an unsuccessful attempt to complete work on the residence, and other reasons, Plaintiffs made telephone request to the Administrator of the Regional Office of the American Arbitration Association in Atlanta, Georgia for a meeting with the Arbitrators to discuss the irreparable harm that would result to Plaintiffs if provisions of the Interim Order and Award of Arbitrators were not carried out. After contacting the Arbitrators, the Administrator advised that the final order and award was in the process of preparation and would be released either November 25, 1988 or November 26, 1988 and that the Arbitrators had advised him that no further meetings would be permitted.

16. The final order of the Arbitrators, entitled "Award of Arbitrators" was placed in the United States Mail on De-

cember 6, 1988 and by virtue of such placement the official date of the final Award of Arbitrators was effective December 6, 1988.

17. The Award of Arbitrators is totally inconsistent with the provisions of the Interim Order and Award of Arbitrators.

18. The final award recites the architect, appointed in the October 3, 1988 Interim Order and Award of Arbitrators, certified the residence as completed on November 21, 1988 when, in fact, the residence is still incomplete in that there are numerous facets of construction which are incomplete or not in accord with the contract documents. Furthermore, the above-mentioned architect, in a letter addressed to one of the Arbitrators on December 7, 1988, after he had been advised that he would have no further input into the completion of the project, states that he did not certify the residence as complete within the terms of the Interim Order and Award and the contract documents. Copy of letter attached.

19. Furthermore, the "Certificate of Occupancy" required by the City of Vestavia Hills, Alabama has not been issued.

20. Plaintiffs are ordered in the final Award of Arbitrators to pay certain sums allegedly due Defendant which include all retainage to be held under the contract between the parties for call backs and incomplete work.

21. The final Award makes no provision for Defendants to furnish Plaintiffs with mechanic and material lien releases as required by the contract documents and, therefore, by the Interim Order and Award of Arbitrators.

22. The final Award miscalculates liquidated damages due to Plaintiffs thereunder and under the Interim Order and Award.

23. The final Award fails to determine the matters in controversy between the parties as submitted by Plaintiff to the American Arbitration Association and as subsequently submitted to the Arbitrators appointed by said Association.

24. Plaintiffs allege, upon information and belief, that the Arbitrators have so imperfectly executed their powers that a

mutual final and definitive award upon the subject matter has not been made.

WHEREFORE, Plaintiffs pray that this court will take jurisdiction of this matter and will, upon a final hearing, vacate the final Award of Arbitrators of December 6, 1988 and will enter a judgment in favor of the Plaintiffs for the relief to which Plaintiffs are entitled.

_____

Jesse P. Evans, III

CLARIFICATION OF ORDER OF ARBITRATORS REQUESTED BY LAND

Land's original estimate to construct 80′ of wall to a 10′ height as required by Wright's drawings per Exhibit "B" is $6,400.00.

Land's estimated costs to construct 80′ of wall to a height of 12′ 8″ as shown in Arnold's drawings is $10,820.00.

Land assumes that Change Order No. 14 in the amount of $3,776.61 in the Arbitrator's Award is intended to compensate Land for the increase in the height and specifications of the wall from Exhibit "B" to Exhibit "C", even though the difference is really $4,420.00.

1. In Item 5.A.4. of the Arbitrator's Award, the cost of the design of the wall as set forth in Exhibit "D" was to be paid for by Wright.

Land has received on October 17 a structural design for a poured, reinforced steel retaining wall. Due to the design of the wall, Land has had to obtain a qualified specialty contractor, "Poured Walls" to construct said wall. Attached is the estimate from Poured Walls, (See Exhibit "1").

Is the additional cost of construction of the 12′ 8″ wall as now designed by Wright in accordance with Exhibit "D" in excess of $10,820.00 to be paid by Wright?

2. Due to the fact that the time for construction of the retaining wall as now designed by Wright is estimated to be 45 to 60 days (working days) after an agreement is reached as to design and responsibility for payment of the costs of the retaining wall, is Land entitled to these additional days to complete and should Land be paid for all other monies due pursuant to the award of the Arbitrators?

3. Does Land have any responsibility for Landscaping other than to pay $2,500 for landscaping as approved by Wright? (See Exhibit "2") Land's suggestion is that Wright be given a $2,500 credit from the contract so that landscaping can be accomplished after Wright's installation of a sprinkler system which she has indicated a desire for.

4. The arbitration award Item 5.b.1 instructs the parties that there will be no communication between the parties. It further says that architect will *not* act as a consultant. Land requests that due to Wright insisting on calling and meeting with architect and incurring substantial unwarranted costs that the architect bill each party directly for those costs as they relate to the services rendered.

AMERICAN ARBITRATION ASSOCIATION

CONSTRUCTION INDUSTRY
ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

ELLOSTEIN WRIGHT
-AND-
LAND DEVELOPERS CONSTRUCTION COMPANY, INC.

CASE NUMBER: 30 110 0033 88

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated October 10, 1986 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD as follows:

The Owner, ELLOSTEIN WRIGHT, is to be given credits of $21,747.00 by the Contractor, LAND DEVELOPERS CONSTRUCTION COMPANY, INC. against the original contract price of $255,512.73.

The Owner's responsbilities outside the terms of the contract for which the Owner is given credit are:

a. Landscaping to be done by Owner	$ 2,500.00
b. Construction of retaining wall to be done by Owner	16,222.00
c. Driveway to be done by Owner	3,025.00
Total Credits	$21,747.00

The construction of the house was ordered by the panel to be completed by 5:00 p.m. November 14, 1988, to avoid assessment of liquidated damages of $500.00. The Architect appointed by the panel in the interim order, has certified that the completion of the house was November 21, 1988.

Therefore, the Contractor is assessed $2,500.00 as liquidated damages, which shall be credit against the final payment due the Contractor by the Owner.

Therefore, ELLOSTEIN WRIGHT shall pay to LAND DEVELOPERS CONSTRUCTION COMPANY, INC. the balance of SEVENTEEN THOUSAND SEVEN HUNDRED SIXTY-FOUR DOLLARS AND NINETY-THREE CENTS ($17,764.93) within ten (10) days from the date of the Award.

The balance due the Contractor by the Owner is computed as follows:

Contract price	$255,512.73
Total payments to date	213,510.80
	42,001.93
Less: Credits	21,747.00
	20,254.93
Less: Liquidated damages	2,500.00
Balance due Contractor	$ 17,754.93

The Architect's fee shall be paid by Owner and Contractor as follows:

The Architect's fee award is:	$3,500.00

ELLOSTEIN WRIGHT shall pay to the Architect, WILLIAM CHAMBERS the sum of ONE THOUSAND SEVEN HUNDRED FIFTY DOLLARS AND NO CENTS ($1,750.00). LAND DEVELOPERS CONSTRUCTION COMPANY, INC. shall pay to the Architect, WILLIAM CHAMBERS the sum of ONE THOUSAND SEVEN HUNDRED FIFTY DOLLARS AND NO CENTS ($1,750.00).

The Owner shall be responsible for payment of her attorney's fee. The Contractor shall be responsible for payment of his attorney's fee.

The Administrative fees and expenses of the American Arbitration Association totaling THREE THOUSAND FOUR HUNDRED SEVENTY-EIGHT DOLLARS AND

TWENTY-SEVEN CENTS ($3,478.27) shall be borne equally by the parties. Therefore, ELLOSTEIN WRIGHT shall pay the the American Arbitration Association the sum of EIGHTY-FOUR DOLLARS AND SIXTY-ONE CENTS ($84.61) for that portion of its share of administrative fees and expenses still due the Association. LAND DEVELOPERS CONSTRUCTION COMPANY, INC. shall pay to the American Arbitration Association the sum of ONE THOUSAND SIXTY-TWO DOLLARS AND EIGHTY-EIGHT CENTS ($1,062.88) for that portion of its share of administrative fees and expenses still due the Association.

The compensation of the arbitrators totaling THREE THOUSAND SEVEN HUNDRED EIGHTY DOLLARS AND NO CENTS ($3,780.00) shall be borne equally by the parties. Therefore, ELLOSTEIN WRIGHT shall pay to the American Arbitration Association the sum of ONE THOUSAND TWO HUNDRED SIXTY DOLLARS AND NO CENTS ($,1260.00) for compensation still due the arbitrators. LAND DEVELOPERS CONSTRUCTION COMPANY, INC. shall pay to the American Arbitration Association the sum of ONE THOUSAND TWO HUNDRED SEVENTY DOLLARS AND NO CENTS ($1,270.00) for compensation still due the arbitrators.

This Award is in full settlement of all claims submitted to this arbitration.

/s/ James H. Faulkner

JAMES H. FAULKNER, ARBITRATOR 12/2/88

/s/ Robert G. Robie

ROBERT G. ROBIE, ARBITRATOR 12/2/88

/s/ Clorindo Belcolore

COLRINDO BELCOLORE, ARBITRATOR 12/5/88

DATED:
State of
County of

On this day of , 19 , before me personally came and appeared
to me known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY TRIBUNAL

In the Matter of the Arbitration between

Ellostein Wright
and
Land Developers Construction Company

Case Number: 30 110 0033 88

INTERIM ORDER AND AWARD OF ARBITRATION

We, the undersigned arbitrators, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties, and dated October 10, 1986 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Order and Award as follows:

1. Land Developers Construction Company (hereinafter called "Land") is to institute the Builders' Risk policy and other necessary insurance for the duration of the project.

2. Land is to repair any and/or all damage residence has suffered since Land left the job.

3. Land will complete all punch list items given them by the Arbitration Architect duly appointed by the arbitrators in this Award.

4. The arbitrators appoint William N. Chambers, 704 37th Street South, Birmingham, Alabama 35205, as Architect for the performance of the work in this award. The Architect will see that the contract work is performed according to the plans and specifications. Architect will perform the inspection services necessary to successfuly complete the remaining work in the contract documents and as stated herein. The fees of the architect will be paid by both parties (50% each) directly to the architect upon billing by the architect.

5. The remaining work will be completed within twenty-eight (28) calendar days (four (4) weeks) from the date of service upon the parties of this award, including all punch list items and inspections by the City. For each day the completed work is not completed past the four (4) week period (twenty-eight (28) calendar days), Land will be assessed Five Hundred dollars ($500.00) per calendar day as liquidated damages. It will be assumed that the twenty-eight (28) calendar days includes seven (7) rain days. For each day or part thereof, that work can not be performed due to rain, the schedule will be extended by that amount of time.

SITE WORK:

A. Retaining walls, walks and drives will be intalled as per drawing prepared by William W. Arnold, Architect, Exhibit "A", along with the following notations:

1. North east curved drive portion will be deleted.
2. East drive will be built straight (without curve) to the street.
3. The retaining wall which cuts the North West corner of the drive area where concrete drive touches, will be built to a height of 1'-0" above concrete surface. The retaining walls on th West side and the North side will be built to a minimum height of 1'-0" below the elevation of the concrete drive adjacent thereto.
4. Design of the concrete retaining wall along the West, North, and turn area shall be designed by a structural engineer if walls exceed the height permitted in contract documents of 12'-8". The cost of the structural design will be paid by Wright.

B. Fill dirt will be removed and reinstalled in accordance with the specifications (compacted and free of decayable items and debris). The Architect shall supervise and inspect.

1. There shall be no communication between the Land and Wright during the completion of the construction. All communication between them will be handled through and

by the Architect. The Architect will not act as a consultant for either party but solely for the purpose of seeing that the remaining work is performed in accordance with the contract documents and the direction of this Arbitration panel. The Architect will perform periodic inspections as he deems necessary.

2. All extra costs claimed by Land are denied.

3. Payment by Wright to Land will be made no later than fourteen (14) calendar days after the house has been completed as per the architect and an occupancy permit obtained from the building inspector. The final payment wil be as follows:

Retainage	$11,288.17
Balance on Contract	$29,749.61
C.O. #14 Extra for retaining wall	$ 3,776.61
	$44,813.78

For each day Wright does not pay this payment after the fourteen (14) calendar day time period, the Claimant will be charged interest at 8% APR starting at 8:00 a.m. on the day following the due date. This payment will be paid to the Architect who will then take it directly to the Defendant or by Certified Mail to be received or could be received by the Defendant no later than the fourteen (14) calendar day deadline.

The arbitration panel retains jurisdiction in this arbitration to render a final award.

/s/ James H. Faulkner

James H. Faulkner, Arbitrator
Dated: September 30, 1988

/s/ Robert G. Robie

Robert G. Robie, Arbitrator
Dated: Sept. 30, 1988

Clorindo Belcolore, Arbitrator
Dated:

AMERICAN ARBITRATION ASSOCIATION

MEDIATION: Please consult the Construction Industry Mediation Rules regarding mediation procedures. If you want the AAA to contact the other party and attempt to arrange a mediation, please check this box. ☐

CONSTRUCTION INDUSTRY ARBITRATION RULES
DEMAND FOR ARBITRATION

February 8, 1988

TO: Land Developers Construction Company, Inc.
1933 Montgomery Highway, P.O. Box 59054
Birmingham, Alabama 35259
(205) 933-2840

Named claimant, a party to an arbitration agreement contained in a written contract, dated October 10, 1986, providing for arbitration under the Construction Industry Arbitration Rules, hereby demands arbitration thereunder.

(Attach arbitration clause or quote hereunder.)

See Exhibit "A" attached hereto.

Nature of Dispute:
See Demand attached hereto.

Claim or Relief Sought: (amount, if any)
See Demand attached hereto.

Please indicate industry category for each party.

Claimant:
— X Owner

Respondent:
— X Contractor

Hearing Locale Requested: Birmingham, Alabama

You are hereby notified that copies of our arbitration agreement and of this demand are being filed with the American Arbitration Association at its Atlanta regional office, with the request that it commence the administration of the arbitration. Under Section 7 of the arbitration rules, you may file an answering statement within seven days after notice from the administrator.

Signed: Jesse P. Evans, III/Arthur Holloway
Title: Attorneys

Name of Claimant: Ellostein Wright
124 Eastwood Drive
Birmingham, Al. 35209
(205) 879-8770

Name of Attorney: Jesse P. Evans, III
1804 Seventh Avenue, North
Birmingham, Alabama 35203
(205) 251-1164

To institute proceedings, please send three copies of this demand and the arbitration agreement, with the filing fee, as provided in Section 48 of the rules, to the AAA. Send the original demand to the respondent.

EXHIBIT "A"

7.7 TESTS

7.7.1 If the Contract Documents, laws, ordinances, rules, regulations or orders of any public authority having jurisdiction require any portion of the Work to be inspected, tested or approved, the Contractor shall give the Owner timely notice of its readiness so the Owner may observe such inspection, testing or approval. The Contractor shall bear all costs of such inspections, tests or approvals conducted by public authorities. Unless otherwise provided, the Owner shall bear all costs of other inspections, tests or approvals.

7.7.2 If the Owner determines that any Work requires special inspection, testing, or approval which Subparagraph 7.7.1 does not include, he will, upon written authorization

from the Owner, instruct the Contractor to order such special inspection, testing or approval, and the Contractor shall give notice as provided in Subparagraph 7.7.1. If such special inspection or testing reveals a failure of the Work to comply with the requirements of the Contract Documents, the Contractor shall bear all costs thereof, including compensation for an Architect's additional services made necessary by such failure; otherwise the Owner shall bear such costs, and an appropriate Change Order shall be issued.

7.7.3 Required certificates of inspection, testing or approval shall be secured by the Contractor and promptly delivered by him to the Owner.

7.7.4 If the Owner is to observe the inspections, tests or approvals required by the Contract Documents, he will do so promptly and, where practicable, at the source of supply.

7.8 INTEREST

7.8.1 Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing at the place of the Project.

7.9 ARBITRATION

7.9.1 All claims, disputes and other matters in question between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the breach thereof, except as provided in Subparagraph 2.2.11 with respect to the decisions on matters relating to artistic effect, and except for claims which have been waived by the making or acceptance of final payment as provided by Subparagraphs 9.9.4 and 9.9.5, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. No arbitration shall include by consolidation, joinder or in any other manner, parties other than the Owner, the Contractor and any other person substantially involved in a common question of fact or law, whose presence is required if complete relief is to be ac-

corded in the arbitration. No person other than the Owner or Contractor shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Any consent to arbitration involving an additional person or persons shall not constitute consent to arbitration of any dispute not described therein or with any person not named or described therein. The foregoing agreement to arbitrate and any other agreement to arbitrate with an additional person or persons duly consented to by the parties of the Owner-Contractor Agreement shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Note but not if not in accord with applicable law.

7.9.2 Notice of the demand for arbitration shall be filed in writing with the other party to the Owner-Contractor Agreement and with the American Arbitration Association. The demand for arbitration shall be made within the time limits specified in Subparagraph 2.2.12 where applicable, and in all other cases within a reasonable time after the claim, dispute or other matter in question has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

7.9.3 Unless otherwise agreed in writing, the Contractor shall carry on the Work and maintain its progress during any arbitration proceedings, and the Owner shall continue to make payments to the Contractor in accordance with the Contract Documents.

ARTICLE 8

TIME

8.1 DEFINITIONS

8.1.1 Unless otherwise provided, the Contract Time is the period of time allotted in the Contract Documents for

Substantial Completion of the Work as defined in Subparagraph 8.1.3, including authorized adjustments thereto.

8.1.2 The date of commencement of the Work is the date established in a notice to proceed. If there is no notice to proceed, it shall be the date of the Owner-Contractor Agreement or such other date as may be established therein.

8.1.3 The Date of Substantial Completion of the Work or designated portion thereof is the Date certified by the Owner and the Contractor when construction is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work or designated portion thereof for the use for which it was intended.

8.1.4 The term day as used in the Contract Documents shall mean calendar day unless otherwise specifically designated.

8.2 PROGRESS AND COMPLETION

8.2.1 All time limits stated in the Contract Documents are of the essence of the Contract.

DEMAND

1. On or about October 10, 1986, Sybil Thelma Wright, Elinor Ellostein Wright, Ruth Alice Wright and Margie June Wright (hereinafter referred to as "Owners") entered into a contract with the contractor, Land Developers Construction Company, Inc., a corporation organized and existing under the laws of the State of Alabama, in which Land Developers agreed to construct a residence for the Wrights located at 2621 Vesclub Circle.

2. The Owners agreed to the sum of $253,728.00, subject to agreed upon additions and deductions.

3. Work on the residence was to commence on October 10, 1986, and substantial completion was to occur April 10, 1987, as per the terms of said contract.

4. Land Developers has breached said contract *inter alia* as follows:

(a) Land Developers failed to achieve substantial completion by April 10, 1987, and has failed to substantially complete the residence as of the date of filing of this demand.

(b) Land Developers has failed to use reasonable effort in reaching an agreement with owners in regard to driveways, walks and retaining walls, as per the terms of said contract.

(c) Land Developers has abandoned construction and has refused to resume construction of the residence in violation of the terms of the Contract.

(d) The construction that has been performed on the residence heretofore has not met the quality of workmanship, construction and materials, as required by the terms of the contract.

(e) Land Developers' refusal to resume construction has prevented Owners from taking possession of and inhabiting the residence.

(f) Land Developers' refusal to resume construction has rendered the residence unmarketable.

(g) Land Developers has failed to provide necessary fill earth and proper compaction in sufficient quantity to support the west driveway, as per the terms of the contract.

(h) Land Developers has failed and refused to provide landscaping and zoyzia sodding in accordance with the reasonable and correct interpretation of the terms of the contract.

(i) Land Developers failed to familiarize itself with local conditions under which the work was to be performed and assimilate those observations with the requirements of the terms of the contract.

(j) Land Developers failed to employ a competent superintendent and necessary assistants to be in attendance at the construction site during progress of the work.

(k) Land Developers has failed to provide Owners with a progress schedule as per the terms of the contract.

(l) Land Developers failed on numerous occasions to schedule workmen to carry on the work for several days at a time without explanation to the Owners.

(m) Land Developers has failed to keep the premises free from accumulation of waste or rubbish caused by construction.

Owners demand that Land Developers complete performance under the contract or alternatively award compensation to the Owners in such amount as is necessary to obtain full performance under the contract elsewhere.

Owners further demand compensatory damages in the amount of $100,000.00, plus such punitive damages as may be warranted under the facts and circumstances of this case and additionally consequential damages arising from the inability of Owners to occupy the residence to be built by Land Developers plus attorneys' fees and costs.

5. Land Developers negligently or wantonly caused construction of the residence to be delayed.

6. Land Developers negligently or wantonly failed to exercise sufficient supervision and control over the construction of the residence, causing said residence to be incomplete and of insufficient quality of workmanship and materials.

7. As a proximate result of Land Developers' negligent or wanton conduct, Owners were caused to suffer the following damages:

(a) Owners were unable to reside in and enjoy the benefits from their new home which was expected on April 10, 1987.

(b) Owners have suffered a diminution in value of their property in that the property is presently unmarketable.

(c) Owners have suffered extreme mental pain and anguish from Land Developers' willful and wanton refusal to complete construction.

8. Owners hereby request an inspection of the subject property by all members of the arbitration panel.

Owners demand that Land Developers complete performance under the contract or alternatively award compensation to the Owners in such amount as is necessary to obtain full performance under the contract elsewhere.

Owners futher demand compensatory damages in the amount of $100,000.00, plus such punitive damages as may be warranted under the facts and circumstances of this case and additionally consequential damages arising from the inability of Owners to occupy the residence to be built by Land Developers plus attorneys' fees and costs.

9. Owners request that a panel consisting of three arbitrators be selected pursuant to Rule 17 of the Construction Industry Arbitration Rules.

AMERICAN ARBITRATION ASSOCIATION

ELLOSTEIN WRIGHT, et al	)	
Claimants,	)	
vs.	)	Case No.
LAND DEVELOPERS CON-	)	30 110 0033 88
STRUCTION CO., INC.,	)	
Respondent.	)	

ANSWER

Respondent Land Developers Construction Co., Inc., answers the demand and claim filed by Ellostein Wright as follows:

FIRST DEFENSE

Respondent denies the material averments of the demand.

SECOND DEFENSE

Respondent denies the debt alleged by the complainant.

THIRD DEFENSE

Respondent's answer to the complaint by numbered paragraphs are as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Denied in its entirety.
5. Denied.
6. Denied.
7. Denied.
8. Admitted as to the necessity of arbitrators making an on-site inspection of subject property, but respondent specifically denies the rest of paragraph 8.
9. Admitted.

/s/ Edward P. Meyerson

Edward P. Meyerson
Attorney for Respondent
NAJJAR, DENABURG, MEYERSON,
ZARZAUR, MAX, WRIGHT & SCHWARTZ
2125 Morris Avenue
Birmingham, Alabama 35203
(205) 250-8400

AMERICAN ARBITRATION ASSOCIATION

ELLOSTEIN WRIGHT, et al Claimants,	)	
vs.	)	Case No. 30 110 0033 88
LAND DEVELOPERS CON-. STRUCTION CO., INC., Respondent.	)	

COUNTERCLAIM

1. On or about October 10, 1986, Sybil Thelma Wright, Elinor Ellostein Wright, Ruth Alice Wright and Margie June Wright (hereinafter referred to as "Owners") entered into a contract with the respondent Land Developers Construction Company, Inc., in which respondent agreed to construct a residence for the owners at an agreed upon sum of of Two Hundred Fifty-Three Thousand Seven Hundred Twenty-Eight ($253,728.00) Dollars subject to agreed upon additions and deductions.

2. The owners have breached said contract as set out above as follows:

A. Owner has failed to provide adequate plans and specifications.

B. Owner has supplied to the respondent plans and specifications which included ambiguities, errors and omissions.

C. Owner has failed to coordinate and control the project as required by the terms of said contract.

D. Owner has required the respondent to perform work out of sequence.

E. Owner has actively interfered with the construction of this project.

F. Owner has failed to make a proper interpretation of the plans and specifications and has improperly rejected the interpretation of the owner's architect of said plans and specifications.

G. Owner has required respondent to perform work which is impractical.

H. Owner has required respondent to try to perform work which is impossible.

I. Owner has failed to approve drawings so respondent could complete its contract.

J. Owner has suspended the project and requied respondent to stop work.

K. Owner has delayed contractor by requiring respondent to rework its work product.

L. Owner has refused to accept completed work.

M. Owner has changed the scope of the contract between the owner and contractor.

N. Owner has made constructive changes for which the owner refuses to execute formal change orders.

O. Owner refuses to take over completed work and respondent has been forced to maintain and protect the work.

Respondent hereby demands compensatory damages in the amount of Twenty-Five Thousand ($25,000.00) Dollars from claimants plus such punitive damages as may be warranted under the facts and circumstances derived from thisdemand and the balance of the amount. The respondent further demands the balance of the amount due from this contract as determined by the arbitrators.

Respondent further demands the arbitrators to award respondent reimbursements of the costs for filing of this counterclaim against the owners.

/s/ Edward P. Meyerson

Edward P. Meyerson
Attorney for Respondent
NAJJAR, DENABURG, MEYERSON
ZARZAUR, MAX, WRIGHT & SCHWARTZ
2125 Morris Avenue
Birmingham, Alabama 35203
(205) 250-8400

CONSTRUCTION INDUSTRY ARBITRATION RULES

As Amended and in Effect January 1, 1986

1. Agreement of Parties — The parties shall be deemed to have made these Rules a part of their arbitration agreement when they have provided for arbitration under the Construction Industry Arbitration Rules. These Rules and any amendment thereof shall apply in the form obtaining at the time the arbitration is initiated.

2. Name of Tribunal — Any Tribunal constituted by the parties for the settlement of their dispute under these Rules shall be called the Construction Industry Arbitration Tribunal, hereinafter called the Tribunal.

3. Administrator — When parties agree to arbitrate under these Rules, or when they provide for arbitration by the American Arbitration Association, hereinafter called AAA, and an arbitration is initiated hereunder, they thereby constitute AAA the administrator of the arbitration. The authority and duties of the administrator are prescribed in the agreement of the parties and in these Rules.

4. Delegation of Duties — The duties of the AAA under these Rules may be carried out through Tribunal Administrators, or such other officers or committees as the AAA may direct.

5. National Panel of Arbitrators — In cooperation with the National Construction Industry Arbitration Committee, the AAA shall establish and maintain a National Panel of Construction Arbitrators, hereinafter called the Panel, and shall appoint an arbitrator or arbitrators therefrom as hereinafter provided. A neutral arbitrator selected by mutual choice of both parties or their appointees, or appointed by the AAA, is hereinafter called the arbitrator, whereas an arbitrator selected unilaterally by one party is hereinafter called the party-appointed arbitrator. The term arbitrator may hereinafter be used to refer to one arbitrator or to a Tribunal of multiple arbitrators.

6. Office of Tribunal — The general office of a Tribunal is the headquarters of the AAA, which may, however, assign

the administration of an arbitration to any of its Regional Offices.

7. Initiation under an Arbitration Provision in a Contract — Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

The initiating party shall, within the time specified by the contract, if any, file with the other party a notice of an intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the nature of the dispute, the amount involved, and the remedy sought; and shall file three copies of said notice with any Regional Office of the AAA, together with three copies of the arbitration provisions of the contract and the appropriate filing fee as provided in Section 48 hereunder.

The AAA shall give notice of such filing to the other party. A party upon whom the demand for arbitration is made may file an answering statement in duplicate with the AAA within seven days after notice from the AAA, simultaneously sending a copy to the other party. If a monetary claim is made in the answer the appropriate administrative fee provided in the Fee Schedule shall be forwarded to the AAA with the answer. If no answer is filed within the stated time, it will be treated as a denial of the claim. Failure to file an answer shall not operate to delay the arbitration.

Unless the AAA in its discretion determines otherwise, the Expedited Procedures of Construction Arbitration shall be applied in any case where the total claim of any party does not exceed $15,000, exclusive of interest and arbitration costs. Parties may also agree to the Expedited Procedures in cases involving claims in excess of $15,000. The Expedited Procedures shall be applied as described in Sections 54 through 58 of these Rules.

8. Change of Claim or Counterclaim — After filing of the claim or counterclaim, if either party desires to make any new or different claim or counterclaim, same shall be made in writing and filed with the AAA, and a copy thereof shall be mailed to the other party who shall have a period of seven days from the date of such mailing within which to file an

answer with the AAA. However, after the arbitrator is appointed no new or different claim or counterclaim may be submitted without the arbitrator's consent.

9. Initiation under a Submission — Parties to any existing dispute may commence an arbitration under these Rules by filing at any Regional Office two copies of a written agreement to arbitrate under these Rules (Submission), signed by the parties. It shall contain a statement of the matter in dispute, the amount of money involved, and the remedy sought, together with the appropriate filing fee as provided in the Fee Schedule.

10. Pre-Hearing Conference and Preliminary Hearing — At the request of the parties or at the discretion of the AAA, a pre-hearing conference with the administrator and the parties or their counsel will be scheduled in appropriate cases to arrange for an exchange of information and the stipulation of uncontested facts so as to expedite the arbitration proceedings.

In large and complex cases, unless the parties agree otherwise, the AAA may schedule a preliminary hearing with the parties and the arbitrator(s) to establish the extent of and schedule for the production of relevant documents and other information, the identification of any witnesses to be called, and a schedule for further hearings to resolve the dispute.

11. Fixing of Locale — The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within seven days after notice of the request is mailed to such party, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have power to determine the locale and its decision shall be final and binding.

12. Qualifications of Arbitrator — Any arbitrator appointed pursuant to Section 13 or Section 15 shall be neutral, subject to disqualification for the reasons specified in Section 19. If the agreement of the parties names an arbitrator or specifies

any other method of appointing an arbitrator, or if the parties specifically agree in writing, such arbitrator shall not be subject to disqualification for said reasons.

13. Appointment from Panel — If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the Panel. Each party to the dispute shall have seven days from the mailing date in which to cross off any names to which it objects, number the remaining names to indicate the order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from other members of the Panel without the submission of any additional lists.

14. Direct Appointment by Parties — If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with name and address of such arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any such appointing party, the AAA shall submit a list of members of the Panel from which the party may make the appointment.

If the agreement specifies a period of time within which an arbitrator shall be appointed, and any party fails to make such appointment within that period, the AAA shall make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the parties to make the appointment, and if

within seven days after mailing of such notice such arbitrator has not been so appointed, the AAA shall make the appointment.

15. Appointment of Arbitrator by Party-Appointed Arbitrators — If the parties have appointed their party-appointed arbitrators or if either or both of them have been appointed as provided in Section 14, and have authorized such arbitrator to appoint an arbitrator within a specified time and no appointment is made within such time or any agreed extension thereof, the AAA shall appoint an arbitrator who shall act as Chairperson.

If no period of time is specified for appointment of the third arbitrator and the party-appointed arbitrators do not make the appointment within seven days from the date of the appointment of the last party-appointed arbitrator, the AAA shall appoint the arbitrator who shall act as Chairperson.

If the parties have agreed that their party-appointed arbitrators shall appoint the arbitrator from the Panel, the AAA shall furnish to the party-arbitrators, in the manner prescribed in Section 13, a list selected from the Panel, and the appointment of the arbitrator shall be made as prescribed in such Section.

16. Nationality of Arbitrator in International Arbitration — If one of the parties is a national or resident of a country other than the United States, the arbitrator shall, upon the request of either party, be appointed from among the nationals of a country other than that of any of the parties.

17. Number of Arbitrators — If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that a greater number of arbitrators be appointed.

18. Notice to Arbitrator of Appointment — Notice of the appointment of the arbitrator, whether mutually appointed by the parties or appointed by the AAA, shall be mailed to the arbitrator by the AAA, together with a copy of these Rules, and the signed acceptance of the arbitrator shall be filed prior to the opening of the first hearing.

19. Disclosure and Challenge Procedure — A person appointed as neutral arbitrator shall disclose to the AAA any circumstances likely to affect his or her impartially, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such arbitrator or other source, the AAA shall communicate such information to the parties and, if it deems it appropriate to do so, the arbitrator and others. Thereafter, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

20. Vacancies — If any arbitrator shall resign, die, withdraw, refuse, be disqualified or be unable to perform the duties of office, the AAA shall, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these Rules. In the event of a vacancy in a panel of arbitrators, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

21. Time and Place — The arbitrator shall fix the time and place for each hearing. The AAA shall mail to each party notice thereof at least five days in advance, unless the parties by mutual agreement, waive such notice or modify the terms thereof.

22. Representation by Counsel — Any party may be represented by counsel. A party intending to be so represented shall notify the other party and the AAA of the name and address of counsel at least three days prior to the date set for the hearing at which counsel is first to appear. When an arbitration is initiated by counsel, or where an attorney replies for the other party, such notice is deemed to have been given.

23. Stenographic Record — Any party wishing a stenographic record shall make such arrangements directly with the stenographer and shall notify the other parties of such arrangements in advance of the hearing. The requesting party or parties shall pay the cost of such record.

24. Interpreter — Any party wishing an interpreter shall make all arrangements directly with an interpreter and shall assume the costs of such service.

25. Attendance at Hearings — Persons having a direct interest in the arbitration are entitled to attend hearings. The arbitrator shall otherwise have the power to require the retirement of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other persons.

26. Adjournments — The arbitrator may adjourn the hearing, and must take such adjournment when all of the parties agree thereto.

27. Oaths — Before proceeding with the first hearing or with the examination of the file, each arbitrator may take an oath of office, and if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person or, if required by law or demanded by either party, shall do so.

28. Majority Decision — Whenever there is more than one arbitrator, all decisions of the arbitrators must be by at least a majority. The award must also be made by at least a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

29. Order of Proceedings — A hearing shall be opened by the filing of the oath of the arbitrator, where required, and by the recording of the place, time, and date of the hearing, the presence of the arbitrator and parties, and counsel, if any, and by the receipt by the arbitrator of the statement of the claim and answer, if any.

The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved. In some cases, part or all of the above will have been accomplished at the preliminary hearing conducted by the arbitrator(s) pursuant to Section 10.

The complaining party shall then present its claims, proofs and witnesses, who shall submit to questions or other exami-

nation. The defending party shall then present its defenses, proofs and witnesses, who shall submit to questions or other examination. The arbitrator may vary this procedure but shall afford full and equal opportunity to the parties for the presentations of any material or relevant proofs.

Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and exhibits in order received shall be made a part of the record.

30. Arbitration in the Absence of a Party or Counsel — Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or counsel, who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as is deemed necessary for the making of an award.

31. Evidence — The parties may offer such evidence as is pertinent and material to the controversy and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the controversy. An arbitrator authorized by law to subpoena witnesses or documents may do so upon the request of any party, or independently.

The arbitrator shall be the judge of the relevance and the materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent in default or has waived the right to be present.

32. Evidence by Affidavit and Filing of Documents — The arbitrator shall receive and consider the evidence of witnesses by affidavit, giving it such weight as seems appropriate after consideration of any objections made to its admission.

All documents not filed with the arbitrator at the hearing, but arranged for at the hearing or subsequently by agreement of the parties, shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded opportunity to examine such documents.

33. Inspection or Investigation — An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the time and the AAA shall notify the parties thereof. Any party who so desires may be present at such inspection or investigation. In the event that one or both parties are not present at the inspection or investigation, the arbitrator shall make a verbal or written report to the parties and afford them an opportunity to comment.

34. Conservation of Property — The arbitrator may issue such orders as may be deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.

35. Closing of Hearings — The arbitrator shall specifically inquire of the parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs are to be filed, the hearings shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided for in Section 32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearing. The time limit within which the arbitrator is required to make the award shall commence to run, in the absence of other agreements by the parties, upon the closing of the hearings.

36. Reopening of Hearings — The hearings may be reopened by the arbitrator at will, or upon application of a party at any time before the award is made. If the reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless the parties agree upon the extension of such time limit. When no specific date is fixed in the contract, the arbitrator may reopen the hearings, and the arbitrator shall have thirty days from the closing of the reopened hearings within which to make an award.

37. Waiver of Oral Hearings — The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

38. Waiver of Rules — Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state an objection thereto in writing, shall be deemed to have waived the right to object.

39. Extensions of Time — The parties may modify any period of time by mutual agreement. The AAA for good cause may extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and its reason therefor.

40. Communication with Arbitrator and Serving of Notices — There shall be no communication between the parties and an arbitrator other than at oral hearings. Any other oral or written communications from the parties to the arbitrator shall be directed to the AAA for transmittal to the arbitrator.

Each party to an agreement which provides for arbitration under these Rules shall be deemed to have consented that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be served upon such party by mail addressed to such party or its attorney at its last known address or by personal service, within or without the state wherein the arbitration is to be held (whether such party be within or without the United States of America), provided that reasonable opportunity to be heard with regard thereto has been granted such party.

41. Time of Award — The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties, or specified by law, no later than thirty days from the date of closing the hearings, or if oral hearings have been waived, from the date of transmitting the final statements and proofs to the arbitrator.

42. Form of Award — The award shall be in writing and shall be signed either by the sole arbitrator or by at least a majority if there be more than one. It shall be executed in the manner required by law.

43. Scope of Award — The arbitrator may grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties. The arbitrator, in the award, shall assess arbitration fees and expenses as provided in Sections 48 and 50 equally or in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA.

44. Award upon Settlement — If the parties settle their dispute during the course of the arbitration, the arbitrator, upon their request, may set forth the terms of the agreed settlement in an award.

45. Delivery of Award to Parties — Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at its last known address or to its attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

46. Release of Documents for Judicial Proceedings — The AAA shall, upon the written request of a party, furnish to such party, at its expense, certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

47. Applications to Court and Exclusion of Liability — (a) No judicial proceedings by a party relatingto the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary party in judicial procedings relating to the arbitration.

(c) Parties to these Rules shall be deemed to have consented that judgment upon the award rendered by the arbitrator(s) may be entered in any Federal or State Court having jurisdiction thereof.

(d) Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules.

48. Administrative Fees — As a not-for-profit organization, the AAA shall prescribe an administrative fee schedule and a refund schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing or the time of refund shall be applicable.

The administrative fees shall be advanced by the initiating party or parties in accordance with the administrative fee schedule, subject to final apportionment by the arbitrator in the award.

When a matter is withdrawn or settled, the refund shall be made in accordance with the refund schedule.

The AAA, in the event of extreme hardship on the party of any party, may defer or reduce the administrative fee.

49. Fee When Oral Hearings are Waived — Where all oral hearings are waived under Section 37, the Administrative Fee Schedule shall apply.

50. Expenses -- The expenses of witnesses for either side shall be paid by the party producing such witnesses.

The cost of the stenographic record, if any is made, and all transcripts thereof, shall be prorated equally between the parties ordering copies, unless they shall otherwise agree, and shall be paid for by the responsible parties directly to the reporting agency.

All other expenses of the arbitration, including required traveling and other expenses of the arbitrator and of AAA representatives, and the expenses of any witness or the cost of any proofs produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise, or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

51. Arbitrator's Fee — Unless the parties agree to terms of compensation, members of the National Panel of Construction Arbitrators will serve without compensation for the first day of service.

Thereafter, compensation shall be based upon the amount of service involved and the number of hearings. An appropriate daily rate and other arrangements will be discussed by the administrator with the parties and the arbitrator(s). If the parties fail to agree to the terms of compensation, an appropriate rate shall be established by the AAA, and communicated in writing to the parties.

Any arrangement for the compensation of an arbitrator shall be made through the AAA and not directly by the arbitrator with the parties. The terms of compensation of neutral arbitrators on a Tribunal shall be identical.

52. Deposits — The AAA may require the parties to deposit in advance such sums of money as it deems necessary to defray the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance.

53. Interpretation and Application of Rules — The arbitrator shall interpret and apply these Rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of any such Rules, it shall be decided by a majority vote. If that is unobtainable, either an arbitrator or a party may refer the question to the AAA for final decision. All other Rules shall be interpreted and applied by the AAA.

EXPEDITED PROCEDURES

54. Notice by Telephone — The parties shall accept all notices from the AAA by telephone. Such notices by the AAA shall subsequently be confirmed in writing to the parties. Notwithstanding the failure to confirm in writing any notice or objection hereunder, the proceeding shall nonetheless be valid if notice has, in fact, been given by telephone.

55. Appointment and Qualifications of Arbitrators — The AAA shall submit simultaneously to each party to the dispute an identical list of five members of the Construction Arbitration Panel of Arbitrators from which one arbitrator shall be

appointed. Each party shall have the right to strike two names from the list on a peremptory basis. The list is returnable to the AAA within ten days from the date of mailing. If for any reason the appointment cannot be made from the list, the AAA shall have the authority to make the appointment from among other members of the Panel without the submission of additional lists. Such appointment shall be subject to disqualification for the reasons specified in Section 19. The parties shall be given notice by telephone by the AAA of the appointment of the arbitrator. The parties shall notify the AAA, by telephone, within seven days of any objections to the arbitrator appointed. Any objection by a party to such arbitrator shall be confirmed in writing to the AAA with a copy to the other party(ies).

56. Time and Place of Hearing — The arbitrator shall fix the date, time, and place of the hearing. The AAA will notify the parties by telephone, seven days in advance of the hearing date. Formal Notice of Hearing will be sent by the AAA to the parties.

57. The Hearing — Generally, the hearing and presentations of the parties shall be completed within one day. The arbitrator, for good cause shown, may schedule an additional hearing to be held within five days.

58. Time of Award — Unless otherwise agreed to by the parties, the award shall be rendered not later than five business days from the date of the closing of the hearing.

Federal Arbitration Act, 9 U.S.C. §§ 1-13

§ 1. "Martime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the

issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [28 USCS], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or

issues to a jury in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and

in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United Staes district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may

apply to the court so specified for an order confirming the awad, and thereupon the court must grant such an order unless the award is vacated, modified, or correced as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award is made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same, vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in the matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribe by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respets, as, and be subject to all provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.